the parties to a contract have in mind its performance, not its breach?[8] When the damages are assessed as those which it is reasonable to suppose that the parties had in mind, what is really meant is that the law, aiming at compensation but proceeding upon principles of justice, considers it fair to hold a defendant for damages which as a reasonable man he ought to have foreseen as likely to follow from a breach.[9] What he in fact foresaw or contemplated is immaterial. Where special circumstances exist, notice is all important in determining whether the consequences were foreseeable to a reasonable man in the defendant's position; but the defendant's consent implied in fact is no more relevant in fixing the extent of his liability than is the existence of a contract implied in fact where recovery is sought upon quasi-contractual grounds. On principle it matters not if notice of the special circumstances which would make a breach especially disastrous comes to the defendant not from the plaintiff but through other channels.[10] The carrier's inability to decline shipments must therefore be considered unimportant in determining his responsibility;[11] and despite the *dicta* of eminent authorities to the contrary, the result of most of the decided cases indicates that this is the law.[12]

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THE CONSTITUTIONALITY OF THE FLAG LAWS. — In 1900 a manufacturer who had been adorning his cigar boxes with pictures of the national flag was indicted under an Illinois Act forbidding the use of such advertising methods except in art exhibitions. The court held[1] the statute unconstitutional as depriving the defendant of liberty without due process of law; as denying him equal protection of the laws, since art exhibitions were excepted; and as interfering in a matter which was exclusively the concern of Congress. In 1904 a similar statute was held unconstitutional in New York, the court taking the ground that it infringed existing property rights.[2] The case against the statutes was simple. They not only deprived people of the liberty of advertising in a certain way, but, if the flag advertisements were already in existence, they deprived people of property as well. This would plainly make them bad under the Fourteenth Amendment unless something could be found to take them out of its operation.

In September, 1905, the Massachusetts law forbidding the use of the state arms in advertising was upheld,[3] and a manufacturer was convicted for

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[8] Professor Williston in 8 HARV. L. REV. 30; Cotton, L. J., in Macmahon *v.* Field, L. R. 7 Q. B. D. 591, 597.

[9] This test is substantially that adopted in the Code Napoleon, Bk. III, Tit. III, §§ 1149, 1150, 1151, cited by Parke, B., in Hadley *v.* Baxendale, *ubi supra*, 346. *Cf.* La. Civil Code § 1934, and Pothier, Obligations, 2d Am. ed., 71 *et seq.*

[10] See Kelly, Maus & Co. *v.* La Crosse Carriage Co., 120 Wis. 84. Mr. Smith makes the forcible suggestion that imposing upon the carrier this liability notwithstanding his inability to refuse the contract is simply another illustration of the burdens which he must take along with his lucrative monopoly. 16 L. Quar. Rev. 283. But that the carrier should be allowed to charge higher rates, see 3 Sutherland, Damages, 3rd ed., 2715.

[12] Missouri, etc., Ry. Co. *v.* Belcher, 89 Tex. 428; Deming *v.* R. R., 48 N. H. 455; Railroad *v.* Cabinet Co., 104 Tenn. 568. Notice after performance has begun is too late. Am. Express Co. *v.* Jennings, 38 So. Rep. 374 (Miss.). As to how definite the notice must be see Kelly, Maus & Co. *v.* La Crosse Carriage Co., *ubi supra.*

[1] Ruhstrat *v.* People, 185 Ill. 133.

[2] People *v.* Van de Carr, 178 N. Y. 425.

[3] Commonwealth *v.* Sherman, 75 N. E. Rep. 71 (Mass.).

using the great seal as a trademark. The court seems to have taken the position that the statute did not deprive the defendant of liberty, since he never had been free to use the state arms as he did. The objection to this theory is that before the passage of the statute state and national emblems had been used for advertising, and yet no one had ever been hindered in the practice, so that if the common law did in truth forbid it, such common law arose neither from custom nor judicial decision.

In October, 1905, under a statute of Nebraska similar to that of Illinois, a merchant was indicted for selling beer bottles with an image of the national flag upon them. *Halter* v. *State*, 105 N. W. Rep. 298. The court held that the statute was valid, and based this decision on the only tenable ground,[4] that though the act involved a deprivation of liberty under the Fourteenth Amendment, it could be justified as an exercise of the police power, that by preventing the national symbol from falling into contempt, it fostered the great civic virtue of patriotism, — in short, that it was in defense of public morality. It was suggested [5] some time before this decision that the principle lying back of these laws was really the same as that appearing in the case of U. S. *v.* Gettysburg Electric Ry. Co.,[6] where the federal government was allowed to condemn for a park the Gettysburg battlefield. That decision can hardly be quarreled with, for clearly patriotism is as much the concern of the state as are the private virtues. But that the presence of an American flag and a sheaf of national standards on the decorative cover of a cigar box has any real tendency to destroy our love of country, or that one who in good faith sells such a box should find himself a criminal, seems hardly reasonable. The law does accomplish the result of sparing the æsthetic sense of the more cultured classes, but it is still doubtful if such a purpose falls within the police power.[7] A principle which permits the suppression indiscriminately of any human activity, on the ground that it offends against the vague canons of good taste, may not become oppressive while it is honestly administered by dispassionate courts and legislators; but it does remove the last vestige of the rigid guarantee against oppressive legislation, for it is invoked as an addendum to a power which admittedly cuts across every constitutional provision with which it comes in conflict.[8]

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# RECENT CASES.

APPEAL AND ERROR — EFFECT OF CHANGE OF STATUTE ON MANDATE OF APPELLATE COURT REVERSING AND REMANDING CAUSE. — In an action by a collector to obtain taxes, the plaintiff was successful in the lower court. On appeal the upper court decreed that as the tax levy was invalid "the judgment is reversed and remanded." Subsequently, but before the mandate of the Supreme Court had been filed in the lower court, a statute was passed validating the levy. In accordance with the new statute the lower court again gave judg-

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[4] *Cf.* Freund, Police Power, § 183.
[5] 4 Columbia L. Rev. 376.
[6] 160 U. S. 668.
[7] *Cf.* Bostock *v.* Sams, 95 Md. 400; People *v.* Green, 85 N. Y. App. Div. 400. *Contra*, Att'y-Gen'l *v.* Williams, 174 Mass. 476; *cf.* also 17 HARV. L. REV. 275.
[8] For a note taking the opposite view, see 35 N. Y. L. J. 670 (Feb. 19, 1906).